IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1901-2002 (02-11,901)**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
STEVEN A . SMITH,	:	
Defendant	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Order entered on or about October 5, 2005, which reinstated Defendant's appeal rights, but otherwise found no merit in Defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts follow.

On October 5, 2002, Defendant was arrested and charged with rape, involuntary deviate sexual assault, sexual assault, aggravated indecent assault, aggravated assault, unlawful restraint, simple assault and terroristic threats. A jury trial was held on March 3-4, 2004. The court granted a demurrer to the aggravated indecent assault charges. The jury found Defendant guilty of simple assault and terroristic threats and acquitted him of the other charges. On May 13, 2004, the Court sentenced Defendant to one to two years for simple assault and a consecutive one to five years for terroristic threats.

On April 8, 2005, Defendant filed a pro se PCRA petition. As this was Defendant's first PCRA petition in this case, the Court appointed counsel to represent Defendant and gave counsel an opportunity to amend Defendant's petition. The Court held an argument on the PCRA petition on October 5, 2005. Defense counsel filed a motion to

withdraw, because Defendant wanted to represent himself so counsel would not waive any of his issues. The Court granted counsel's motion to withdraw. The Court also reinstated Defendant's direct appeal rights nunc pro tunc, but otherwise determined that the issues raised by Defendant lacked merit. Defendant filed a timely notice of appeal.

Defendant first asserts the trial judge should have recused himself from handling Defendant's trial because: (1) he had filed suit against the trial judge and the public defender; and (2) the trial judge would not let Defendant dismiss his public defender despite Defendant's various complaints about the public defenders. The Court cannot agree. First, the Court notes that Defendant or his counsel never filed a written motion for recusal. The closest thing to a written recusal motion was a request for change of venue in Defendant's Omnibus Pre-trial Motion, in which Defendant stated he instituted litigation in the past against Lycoming County judges and public official and he had been critical of the trial judge. Defendant claims he made oral motions for recusal; however, the record does not reflect such motions being made. It is Defendant's or his counsel's obligation to make sure any such motions is made on the record in the presence in the court reporter. The court does not recall whether such a motion was made. Even if Defendant made an appropriate motion, recusal was not required in this case.

> Our Supreme Court has noted that 'recusal is required whenever there is a substantial doubt as to a jurist's ability to preside impartially.' Commonwealth v. Boyle, 498 Pa. 486, 490, 447 A.2d 250, 252 (19820(footnote and citations omitted). The party moving for recusal bears the burden of producing evidence that establishes bias, prejudice or unfairness necessitating recusal. Commonwealth v. Stanton, 294 Pa.Super. 516, 522, 440 A.2d 585, 588 (1982)(citations omitted). Furthermore, a judge's decision not to recuse himself will not be disturbed absent an abuse of discretion. Commonwealth v. Darush, 501 Pa. 15, 21, 459 A.2d 727, 732 (1983).

Commonwealth v. Mickell, 409 Pa.Super. 595, 601, 598 A.2d 1003, 1006 (1991).

Although Defendant filed a lawsuit against the undersigned and several others on or about April 17, 2001, Court did not recall being sued by Defendant and the suit did not affect the Court's ability to handle Defendant's case in any way. In fact, the claims against the court were dismissed by the Honorable J. Michael Williamson on May 30, 2001, almost three years prior to Defendant's trial. The Court is attaching a copy of this Order as Exhibit A for the convenience of the Appellate Courts and the parties.

The Court is baffled by Defendant's claims about the Public Defender in paragraphs 1B-1E of his memorandum in support of his PCRA. Defendant was not represented by any member of the public defenders office in this case. On October 14, 2002, the Honorable Clinton W. Smith appointed James Protasio to represent Defendant. Mr. Protasio is a conflict attorney whose office is separate from the Public Defender's Office.[1] This case was reassigned and William Kovalcik was appointed to represent Defendant on or about September 29, 2003. Mr. Kovalcik also was a conflict attorney. His office was located in Wellsboro, Pennsylvania.

The Court did not have any bias or hostility toward Defendant. The Court permitted the defense to introduce letters from the victim, in which she professed her love for Defendant, and allowed the defense to present evidence of the prior consensual relationship between Defendant and the victim. The Court also granted demurrers to two counts of aggravated indecent assault. Defendant's claims that the undersigned should have recused himself from handling this case lack merit.

Defendant next asserts the undersigned denied him discovery regarding the

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1 The Public Defender's Office is located on the third floor of 48 West Third Street, Williamsport, Pennsylvania. Mr. Protasio's office is located on Riverside Drive in South Williamsport.

victim's mental health records. Initially, the Court notes that Judge Butts handled Defendant's discovery requests. Nevertheless, the request was appropriately denied because psychological and psychiatric communications, records and reports are privileged and not subject to discovery. See 42 Pa.C.S.A. §5944; 50 P.S. §7111; Commonwealth v. Counterman, 553 Pa. 370, 392, 719 A.2d 284, 295 (1998)("The statutory privilege set forth in Section 5944 is not outweighed by either a defendant's Sixth Amendment right to cross-examine a witness or his right to due process of law.").

Defendant next asserts the Court admonished him at trial when he was trying to explain that he might use swear words or foul language in his testimony or in his taped conversations with the victim, prejudicing him in front of the jury. Defendant's allegations are not completely accurate and/or are not supported by the record. Although the Court admonished Defendant, it was outside the presence of the jury. N.T., March 3-4, 2004, at 255. Furthermore, the Court did not preclude Defendant from using such language if the words were part of Defendant's and the victim's conversations and arguments on the night in question; the Court simply asked Defendant not to gratuitously use foul language during his trial testimony.

Defendant next contends he was not allowed to hear the tape of his prison conversations with the victim prior to trial even when he requested this from his attorney. There is nothing in the record that the Court or anyone else precluded Defendant from listening to the tape prior to trial or prior to it being played for the jury. Defendant did not file any witness certification related to this issue. See 42 Pa.C.S.A. §9545(d)(1). Therefore, Defendant has not presented sufficient information to obtain an evidentiary hearing on this issue. Furthermore, it appears Defendant is attempting to present a claim of ineffective

assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, Defendant must plead and prove that: (1) the issue is of arguable merit; (2) counsel had no reasonable basis for his actions or omissions; and (3) prejudice, i.e., but for counsel's acts or omissions it is likely the outcome of the trial would have been different. Defendant has not pleaded any of these elements. Moreover, Defendant admitted in his trial testimony that he committed a simple assault against the victim.

Defendant also claims the recording was taken out of context and greatly inflamed the jury against him. Defendant contends a portion of the recording was played for the jury where he told the victim that if he weren't a Christian he would have killed her a long time ago for cheating on him and giving him a social disease and he regretted greatly not doing so. There were portions of about three phone conversations Defendant had with the victim during his pre-trial incarceration played to the jury in this case. Prior to playing any portions, the Court held a sidebar conference with the attorneys. The Commonwealth indicated it wanted to present portions of the tapes where Defendant admitted he hit or punched the victim. The issue was whether Defendant's statements that he would do it again could be redacted. N.T., March 3-4, 2004, at 71-75. The Commonwealth introduced portions of the tape during direct examination of the victim. It appears that the portions related either to whether the parties knew the conversation would be recorded or the Defendant's admission that he hit or punched the victim on the night in question. N.T., at 92-99.[2] Instead, it appears that **defense counsel** wanted to cross-examine the victim about whether she ever claimed rape by other people before as an excuse for giving Defendant a venereal disease and/or to give another individual a hard time for reporting her to Children

and Youth and the Commonwealth objected or opposed the introduction of such testimony. N.T., at 76-77.

Defendant next asserts that it took over a year to go to trial and that issue has never been addressed or a proper answer given for this delay. The Court ordinarily only addresses trial delay when a motion asserting a violation of Rule 600 is filed. Such a motion was never filed in this case. A review of the case file, however, indicates the delay was attributable to continuances made by defense counsel. Defendant's preliminary hearing was continued from October 9, 2002 to November 6, 2002, so a conflict attorney could be appointed to represent Defendant. On March 4, 2003 defense counsel requested a continuance and the case was rescheduled for April 10, 2003. On April 24, 2003, the case was continued because of animosity between Defendant and his conflict attorney James Protasio and Judge Butts ordered a psychological evaluation of Defendant. On June 5, 2003, defense counsel requested a continuance and the case was rescheduled for July 17, 2003. On July 17, 2003, defense counsel requested a continuance and the case was rescheduled for September 25, 2003. On September 29, 2003, Judge Smith reassigned Defendant's case from James Protasio to William Kovalcik at the request of Judge Butts. On November 13, 2003, defense counsel requested a continuance to December 18, 2003. Judge Butts granted the request and directed defense counsel to file a motion for formal discovery alleging all issues to be raised. On November 20, 2003, defense counsel filed an Omnibus Pretrial Motion on Defendant's behalf which included a motion for discovery, a motion for change of venue, a motion for modification of bail conditions and a motion for DNA testing. Defense counsel requested a continuance on December 18, 2003, which was granted. An argument

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2 The prison conversations were placed onto two CDs, which were Commonwealth's Exhibit 18.

was held on the Omnibus Pretrial motion on January 8, 2004 and Judge Butts ruled on the motion on January 20, 2004. Jury selection was held on February 24, 2004. The jury trial was March 3-4, 2004.

Defendant next claims he was sentenced to two consecutive sentences, out of the guideline ranges for the same incident, which was illegal, improper, and not authorized by statute or law. The Court sentenced Defendant to incarceration in a state correctional institution for 1 -2 years for simple assault and a consecutive one to five years for terroristic threats. Consecutive sentences for these convictions are not illegal or improper where, as here, the simple assault is based on causation of bodily injury and the terroristic threat is based upon a threat to kill the victim. See Commonwealth v. Thomas, 879 A.3d 246, 253-264 (Pa.Super. 2005)(where simple assault based on an attempt to cause or causation of bodily injury, the crime of terroristic threats does not merge for simple assault and the trial court did not commit legal error in imposing separate sentences for those crimes).

Defendant also asserts that the Court sentencing in the aggravated range for both convictions violates Blakely v. Washington 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the Court enhanced Defendant's sentence based on facts other than those found by the jury. The Court did sentence Defendant in the aggravated range for both offenses. Defendant had a prior records score of three and both offenses had an offense gravity score of three, making the standard minimum guideline range RS to < 12 and the aggravated minimum guideline range 12 to 15 months. The Court stated on the record that the reasons for the aggravated range sentence were: (1) Defendant was out on bail when the offenses were committed; (2) there was significant physical and mental damage to the victim that may be long lasting; (3) Defendant did not have any remorse for his actions and (4)

Defendant presented a danger to the victim and perhaps other people. N.T., May 13, 2004, at 36. The Pennsylvania Superior Court has found Blakely does not prohibit the sentencing judge from imposing a sentence in the aggravated range. Commonwealth v. Bromley, 862 A.2d 598, 603 (Pa.Super. 2004)("Blakely does not implicate the Pennsylvania scheme, where there is no promise of a specific sentence, and a judge has the discretion to sentence in the aggravated range so long as he or she provides reasons for the sentence."); see also Commonwealth v. Druce, 868 A.2d 1232, 1239-1240 (Pa.Super. 2005); Commonwealth v. Smith, 863 A.2d 1172, 1178-1179 (Pa.Super. 2005).

Defendant's final contention is that he was on so much antibiotic medication at the time of trial that his competence was affected and he seemed unsettled and extremely anxious to the jury. The Court denied this claim for several reasons. First, it was not raised at the time of trial. If defense counsel had reason to believe Defendant was not competent, he could have requested a continuance for a competency evaluation. Furthermore, Defendant's actions and responses at trial were typical of this Court's experiences with Defendant. Second, Defendant testified at trial and showed that he had the ability to remember the night in question and communicate those events to others. Third, Defendant would need to present medical evidence regarding what effect, if any, the medication would have on his ability to participate in his trial. Defendant has not produced a certification for any witness who could testify on this issue. Therefore, there was no reason to hold an evidentiary hearing. See 42 Pa.C.S.A. §9545(d)(1).[3]

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3 The only witness Defendant identified in his PCRA petition was the victim, Deborah Klopp. Defendant indicated Ms. Klopp would testify that "this was one incident, where alcohol was involved. That the threats were made in the heat of passion, and in anger, with no public inconvenience. At most personal intimidation." The only issue that would seem to relate to this is that the Court sentenced to two consecutive sentences for the same incident. As explained above, that issue lacks merit. Defendant did not raise any issue that the evidence

DATE: ____________ By The Court,

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Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)
Jay Stillman, Esquire
Steven Smith, FE-5013
10745 Route 18, Albion, PA 16475-0002
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

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was insufficient to support a conviction for terroristic threats. Therefore, any such issue is waived. In the event the appellate courts would construe paragraph 12A regarding the substance of witness testimony as raising such an issue, the Court notes the following. First, Defendant was charged with and convicted of violating 18 Pa.C.S.A. §2706(a)(1), which states: "A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another." This subsection deals with "personal intimidation." He was not charged with Section 2706(a)(3). Therefore, the Commonwealth did not have to show public inconvenience and such a concept was irrelevant in this case. Second, "[b]eing angry does not render a person incapable of forming the intent to terrorize." Commonwealth v. Fenton, 750 A.2d 863, 865 (Pa.Super. 2000). Although the statute is not intended to penalize transitory or spur of the moment anger, the Court does not believe Defendant's anger in this case was transitory. Given the facts and circumstances of this case, including that the threat to kill the victim was made during physical altercation, the Court finds there was sufficient evidence to show Defendant intended to terrorize Ms. Klopp when he threatened to kill her.